(3)

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 520

IRWIN UNGER,

Petitioner,

vs.

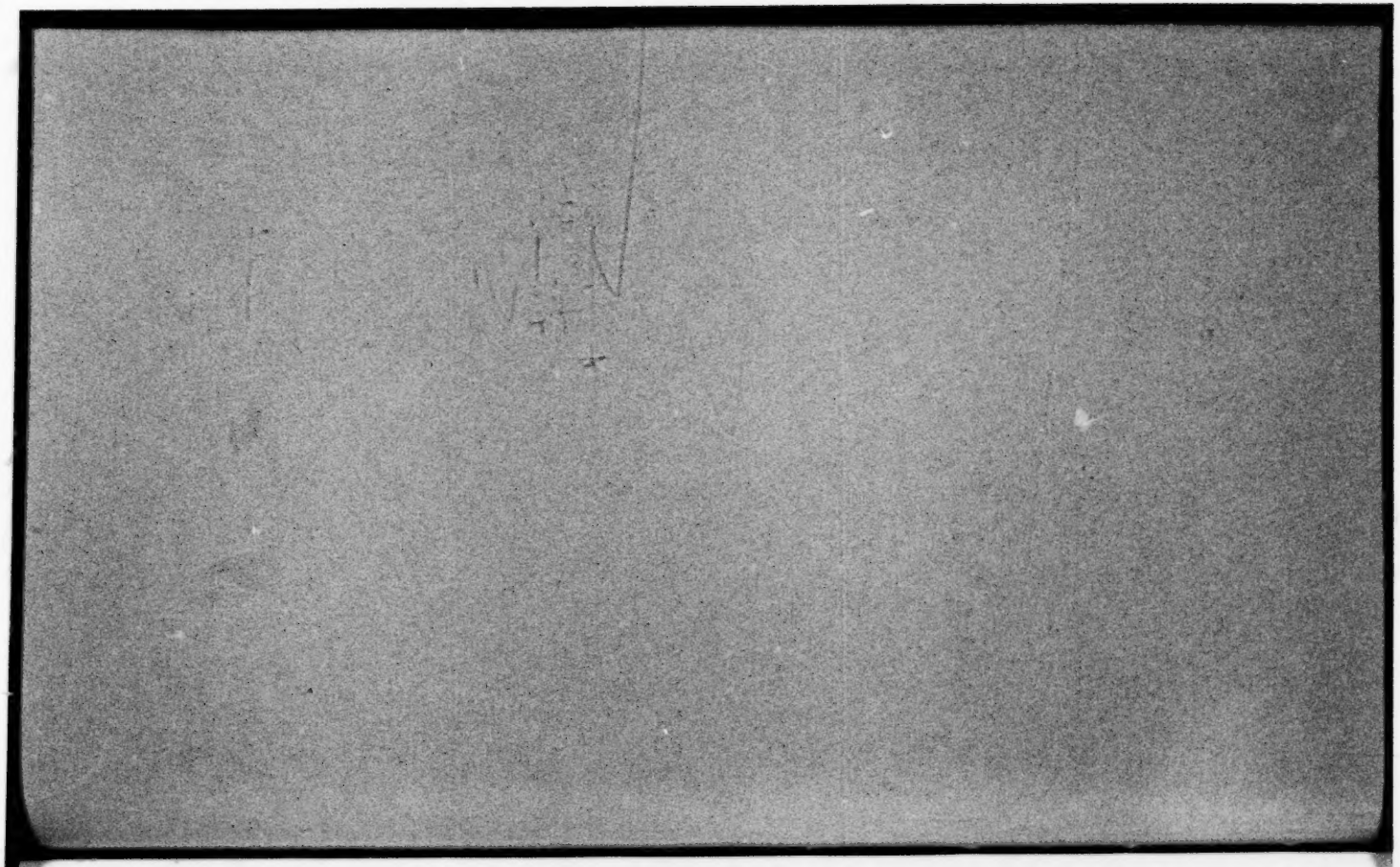
THE OHIO STATE DENTAL BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio
and
BRIEF OF PETITIONER,
In Support of Petition for Writ of Certiorari,
Together With
The Opinion of the Supreme Court of Ohio.

WILLIAM J. CORRIGAN,
620 Williamson Building,
Cleveland, Ohio,
Attorney for Petitioner.

THE GONGE LEGAL PRINTING CO., CLEVELAND, OHIO—MAIN 8447



INDEX.

AUTHORITIES CITED.

Cases.

Texts.

Statutes.

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. . . . . .

IRWIN UNGER,
Petitioner,

vs.

THE OHIO STATE DENTAL BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Your petitioner respectfully prays for a writ of certiorari to review the decision of the Supreme Court of the State of Ohio in the above case.

The petitioner seeks a review of the judgment of the Supreme Court of Ohio which affirmed a judgment of the Ohio State Dental Board, whereby the petitioner without due process of law was barred of his right to practice his profession of dentistry.

SUMMARY OF THE MATTER INVOLVED.

The proceedings by which the petitioner has been deprived of this valuable right took place before the Ohio State Dental Board, a body created and existing by virtue of Section 1314 of the General Code of the State of Ohio. The Board consists of five graduate dentists appointed by the Government of the State of Ohio.

On April 14, 1941, there was filed before the Board by one of their agents a statement of charges, in which the petitioner was charged with a number of violations of the State Dental Board. The charges were as follows:

The undersigned hereby charges that Dr. Irwin Unger, a duly licensed dentist by the State of Ohio, practicing in the City of Cleveland, Ohio, has in the practice and in the method of conducting his dental office, during his practice in Cleveland and vicinity, between the dates January 15, 1941, and June 19, 1941, been guilty of practices and acts violating the Dental Code of Ohio, in the following particulars, to wit:

A.

That the said Dr. Irwin Unger has employed or made use of advertising solicitors or publicity agents as herein specified.

1. Said Dr. Irwin Unger has employed Henry Urden and/or Edward Urden, doing business as the State Dental Laboratory, and/or Henry Urden and/or Edward Urden and/or State Dental Laboratory, as an advertising solicitor and/or publicity agent, between the dates of January 15, 1941, to June 19, 1941.

2. Said Dr. Irwin Unger has employed Henry Urden and/or Edward Urden as an advertising solicitor and/or publicity agent between January 15, 1941, to June 19, 1941.

3. Said Dr. Irwin Unger has made use of advertising solicitors and/or publicity agents, to wit: Henry Urden and/or Edward Urden, doing business as the State Dental Laboratory, Edward Urden and/or Henry Urden and State Dental Laboratory, between the dates of January 15, 1941, and June 19, 1941.

4. In that in October, 1939, the State Dental Laboratory was established in Cleveland, Ohio, at 378 Old Arcade; that Henry Urden and/or Edward Urden is the manager, proprietor, operator or conductor of the State Dental Laboratory; that Henry Urden and/or Edward Urden are associated and connected therewith; that said State Dental Laboratory was established and exists for the purpose of soliciting dental services and giving dental advice; that the State Dental Laboratory is in the nature of an advertising solicitor and/or publicity agent for the benefit of Dr.

Irwin Unger; that the State Dental Laboratory is acting as solicitor and/or publicity agent for said Dr. Irwin Unger in the procurement of dental patronage; that said Dr. Irwin Unger is the dentist for the said State Dental Laboratory; and that in the operation of the State Dental Laboratory Dr. Irwin Unger is part and parcel of the State Dental Laboratory; that Dr. Irwin Unger shares and/or divides professional fees with it; that as a result of the activities of the State Dental Laboratory, through newspaper advertisements and personal solicitors, said Dr. Irwin Unger, with knowledge of their source, accepted a great number of dental cases, the exact number of which is unknown to this complainant, from the State Dental Laboratory.

B.

That the said Dr. Irwin Unger has made use of advertising statements of a character tending to deceive or mislead the public as herein specified.

1. Advertisements of the State Dental Laboratory in the Cleveland Press and the Cleveland News, between the dates of January 15, 1941, to June 19, 1941, in the following particulars. A copy of said ad is marked Exhibit "A" and is attached hereto and made a part hereof.

(a) "All plates made from impressions furnished by licensed dentists." This phrase and this advertisement implies that licensed dentists are in attendance and connected with the State Dental Laboratory.

(b) The ad implies that the prices quoted in said ads includes all of the professional services required in connection with the completion of the dentures so advertised, when in truth and fact an additional charge is made by the dentist.

(c) That said advertisements in said newspapers set forth certain definite prices for dental work and plates when, as a matter of fact, no set prices are maintained, but the greatest price possible is obtained from each patient for the plates sold or the work desired to be done; and the teeth and materials used in all

cases are of the same quality and of an inferior grade regardless of the price obtained for the denture and regardless of the representation made in regard to the quality of teeth and material for the various priced dentures.

(d) In that said State Dental Laboratory did advertise unbreakable plates, when, in truth and in fact, there are no such dentures known to the profession.

C.

That said Dr. Irwin Unger has advertised prices for professional services as herein specified.

1. In that said Dr. Irwin Unger did advertise through the State Dental Laboratory in the Cleveland News and Cleveland Press prices for professional services between the dates January 15, 1941, and June 19, 1941.

D.

In that the said Dr. Irwin Unger has advertised by means of a large display, a glaring light sign or sign containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head in the following particulars.

1. In that the State Dental Laboratory has, in its window on Euclid Avenue, a glaring light sign.

2. In that there appears in its advertisements in the said newspapers the representation of teeth and dentures.

E.

That Dr. Irwin Unger has advertised free dental work or free examination as here specified.

1. In that Dr. Irwin Unger, through the State Dental Laboratory, in the Cleveland Press and Cleveland News, offers free dental work in the following statement: "$2.00 credit on your new plates when you present this ad."

F.

That the said Dr. Irwin Unger has been guilty of grossly immoral conduct tending to deceive and/or defraud the public and that such conduct has deceived and/or defrauded the said public in the following particulars.

1. Said Dr. Irwin Unger has conducted his practice and maintained dental offices in charge of laymen and unlicensed persons, to wit: Edward Urden and/or Henry Urden and/or the State Dental Laboratory, who have made examinations and diagnosis and prescribed for the dental needs of patients with the knowledge and consent of the said Dr. Irwin Unger, as heretofore set forth.

2. Said Dr. Irwin Unger takes instructions from laymen, to wit, Henry Urden and/or Edward Urden and/or State Dental Laboratory, as to the amount, type and price of dental work to be performed on the patient; and by so doing, Dr. Irwin Unger does not use his professional skill, learning and knowledge in determining the dental work and needs of the patient.

3. That said layman sells the patient whatever he wants even though it is not what the patient needs or is harmful to the patient, thus not allowing the dentist to use his professional skill, learning and knowledge in advising the patient as to his dental needs.

G.

Said Dr. Irwin Unger has been guilty of such immoral conduct and has so conducted his office or offices as to disqualify him to practice dentistry with safety to the public of the State of Ohio, more specifically as follows:

1. Said Dr. Irwin Unger has conducted his practice and maintained dental offices in charge of laymen and unlicensed persons, to wit, Edward Urden and/or Henry Urden and/or State Dental Laboratory, who have made examinations and diagnosis and prescribed for the dental needs of patients with the knowledge and consent of the said Dr. Irwin Unger, as heretofore set forth.

2. Said Dr. Irwin Unger takes instructions from laymen, to wit, Henry Urden and/or Edward Urden and/or State Dental Laboratory, as to the amount, type and price of dental work to be performed on the patient, and by so doing, Dr. Irwin Unger does not use his professional skill, learning and knowledge in determining the dental work and needs of the patient.

3. That said layman sells the patient whatever he wants even though it is not what the patient needs or is harmful to the patient, thus not allowing the dentist to use his professional skill, learning and knowledge in advising the patient as to his dental needs.

H.

That said Dr. Irwin Unger, having a license to practice dentistry, entered the employment of and/or entered into arrangements with an unlicensed manager, proprietor, operator or conductor in violation of Section 1329 of the General Code in the following particulars, to wit:

1. In that Edward Urden and/or Henry Urden is the manager, proprietor or operator or conductor of a place for performing dental operations, to wit: State Dental Laboratory, to wit:

(a) In that the said Edward Urden and/or Henry Urden interview patients and make the initial examination and diagnosis.

2. That the State Dental Laboratory, Henry Urden and/or Edward Urden, doing business as the State Dental Laboratory and/or Edward Urden and/or Henry Urden, for a fee, salary or other reward, paid or to be paid either to himself or to another person, performs or advertises to perform dental operations of any kind.

3. In that Dr. Irwin Unger is employed by a manager, proprietor, operator or conductor, to wit, State Dental Laboratory, and/or Henry Urden and/or Edward Urden.

4. Said Henry Urden and/or Edward Urden and/or Henry Urden and/or Edward Urden, doing

business as the State Dental Laboratory and/or Henry Urden and/or Edward Urden, placed in the possession of Dr. Irwin Unger dental offices and/or dental equipment necessary for the handling of a dental office on the basis of a lease and/or other agreement for compensation or profit for the use of such offices or equipment when such compensation was manifestly in excess of the reasonable rental value of such premises and equipment.

5. In that the State Dental Laboratory, Henry Urden and/or Edward Urden, doing business as State Dental Laboratory and/or Henry Urden and/or Edward Urden, made other arrangements whereby they derive profit, compensation or advantage through retaining the ownership or control of dental offices or necessary dental equipment by making the same available in any manner whatsoever for the use of Dr. Irwin Unger; and that the said arrangement was not a bona-fide sale of dental equipment secured by chattel mortgage.

The undersigned hereby charges and alleges by reason of the foregoing practices, said Dr. Irwin Unger's license should be revoked or suspended by this Board, and your complainant therefore requests that notice of these charges be served upon the said Dr. Irwin Unger; and that a time and place be set for the hearing of the same in the near future as provided by statute.

On July 31, 1941, the Ohio State Dental Board found the petitioner guilty as follows:

1. That between the dates of April 15, 1941, and June 19, 1941, the said Dr. Irwin Unger has made use of advertising solicitors or publicity agents in violation of Section 1325 General Code of Ohio.

2. That during the same period the said Dr. Irwin Unger has made use of advertising statements of a character tending to deceive or mislead the public, in violation of Section 1325 General Code of Ohio.

3. That the said Dr. Irwin Unger is guilty of grossly immoral conduct tending to deceive or defraud

the public; or which disqualifies him to practice with safety to the public, in violation of Section 1325 General Code of Ohio.

4. That the said Dr. Irwin Unger, having a license to practice dentistry in the State of Ohio, was a party to an arrangement of a type prohibited by Section 1329 General Code of Ohio with the State Dental Laboratory.

and on that day revoked the right of the petitioner to practice dentistry. Error was prosecuted to the Court of Common Pleas of Cuyahoga County, and on January 16, 1942, the Court of Common Pleas of Cuyahoga County found that there was evidence that sustained only Specification A-3 of the Statement of Charges. That specification is as follows:

"Said Dr. Irwin Unger has made use of advertising solicitors and/or publicity agents, to wit: Henry Urden and/or Edward Urden, doing business as the State Dental Laboratory, Edward Urden and/or Henry Urden and State Dental Laboratory, between the dates of January 15, 1941, and June 19, 1941."

Said Court found that the violation of that specification was sufficient justification for the Ohio State Dental Board to revoke the right of the petitioner to practice dentistry. Appeal was taken to the Court of Appeals of Cuyahoga County, which affirmed the judgment without opinion.

Petitioner further alleges that in this cause on the 11th day of August, 1943, final judgment was rendered against the petitioner by the Supreme Court of the State of Ohio. A copy of the Opinion is hereto attached and marked "Appendix No. 1."

THE STATUTE INVOLVED.

General Code of Ohio Section 1325, which is as follows:

"License may be revoked or suspended, when. The state dental board may warn, reprimand, or otherwise discipline a licensee for any violation of its rules or of any laws pertaining to the practice of dentistry or dental hygiene and in addition thereto may revoke or suspend a license obtained by fraud or misrepresentation, or if the person accused is convicted subsequent to the date of his license of a felony involving moral turpitude, or is convicted for the violation of any provisions of the law regulating the practice of dentistry or dental hygiene, or becomes guilty of chronic or persistent inebriety or addiction to drugs; or if the person holding such license makes use of any advertising statements of a character tending to deceive or mislead the public, or advertises or publishes false, fraudulent or misleading statements of his superior skill or knowledge or the superior nature of his methods of treatment or practice; or advertises by means of large display, glaring light sign, or sign containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; or employs or makes use of advertising solicitors or publicity agents; or advertises any free dental work or free examination; or advertises to guarantee any dental service; or to perform any dental operation painlessly; or has been found guilty of employing or permitting an unlicensed person to perform dental operations which, under this act, can only be performed by a person licensed to practice dentistry in this state; or is guilty of any grossly immoral conduct tending to deceive or defraud the public; or which disqualifies him to practice with safety to the public. All advertising by any medium whatsoever including radio, must conform to the requirements of this section."

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 344 (b), Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, and March 8, 1939.

Judgment of the Ohio State Dental Board was affirmed on July 7, 1943. Rehearing thereon was denied August 11, 1943. On the 11th day of November, 1943, it was ordered by the Supreme Court of the United States that the time for filing the petition for certiorari was extended to and including December 11, 1943.

REASONS FOR GRANTING THE WRIT.

The petitioner is a professional dentist, practicing his profession for a great number of years, and under the holding can no longer practice his profession. The Supreme Court held by its judgment that there was no error in the action of the Ohio State Dental Board in revoking the license of the petitioner to practice dentistry. Petitioner says he has been deprived of his right without due process of law in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that he was tried before a court of the kind that was condemned in the case of *Tumey v. State,* 273 U. S. 510, 71 L. Ed. 749, 47 S. Ct. 437.

1. One member of the Ohio State Dental Board actively engaged in the securing of evidence and was financially interested in the outcome of the case, having paid money to witnesses who testified in behalf of the respondent. This Board member proceeded to sit as one of the judges until a witness pointed him out as the man who had paid him the money.

2. The case was tried on the theory of a conspiracy. The record fails to disclose any evidence of a conspiracy.

3. Hearsay evidence was admitted over petitioner's objection on the theory of a conspiracy and upon a statement that the evidence would be connected with petitioner. No testimony in any manner connecting the conversations with petitioner was offered.

Petitioner says that in the rulings and judgments made by the Supreme Court of Ohio that the court erred to the prejudice of the applicant.

WHEREFORE, your petitioner prays for allowance of a writ of certiorari from the Supreme Court of the State of Ohio to the Supreme Court of the United States and the judges thereof to the end that the record in this case may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment reversed and set aside and judgment rendered for the petitioner.

IRWIN UNGER,

By WILLIAM J. CORRIGAN,

His Attorney.

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. . . . . .

IRWIN UNGER,
Petitioner,

vs.

THE OHIO STATE DENTAL BOARD,
Respondent.

BRIEF OF PETITIONER
In Support of Petition For Writ of Certiorari.

The license of petitioner to practice dentistry was revoked by the Ohio State Dental Board. This action was confirmed by the Court of Common Pleas of Cuyahoga County, Ohio, the Eighth District Court of Appeals and the Ohio Supreme Court. The Opinion of the Ohio Supreme Court is hereto attached and marked "Appendix No. 1."

The charges on which this finding was made appear in a Petition for a Writ of Certiorari, pages 2, 3, 4 and 5, and are a tangle of words and phrases that allege that the petitioner violated every restriction of General Code 1325 with the exception of the fact that he was not convicted of a crime.

Section 1325 is as follows:

> "License may be revoked or suspended, when. The state dental board may warn, reprimand, or otherwise discipline a licensee for any violation of its rules or of any laws pertaining to the practice of dentistry or dental hygiene and in addition thereto may revoke or suspend a license obtained by fraud or misrepresentation, or if the person accused is convicted subsequent

to the date of his license of a felony involving moral turpitude, or is convicted for the violation of any provisions of the law regulating the practice of dentistry or dental hygiene, or becomes guilty or chronic or persistent inebriety or addiction to drugs; or if the person holding such license makes use of any advertising statements of a character tending to deceive or mislead the public, or advertises or publishes false, fraudulent or misleading statements of his superior skill or knowledge or the superior nature of his methods of treatment or practice; or advertises by means of large display, glaring light sign, or sign containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; or employs or makes use of advertising solicitors or publicity agents; or advertises any free dental work or free examination; or advertises to guarantee any dental service; or to perform any dental operation painlessly; or has been found guilty of employing or permitting an unlicensed person to perform dental operations which, under this act, can only be performed by a person licensed to practice dentistry in this state; or is guilty of any grossly immoral conduct tending to deceive or defraud the public; or which disqualifies him to practice with safety to the public. All advertising by any medium whatsoever including radio, must conform to the requirements of this section."

On July 31, 1941, the Ohio State Dental Board found the petitioner guilty as follows:

1. That between the dates of April 15, 1941, and June 19, 1941, the said Dr. Irwin Unger has made use of advertising solicitors or publicity agents in violation of Section 1325 General Code of Ohio.

2. That during the same period the said Dr. Irwin Unger has made use of advertising statements of a character tending to deceive or mislead the public, in violation of Section 1325 General Code of Ohio.

3. That the said Dr. Irwin Unger is guilty of grossly immoral conduct tending to deceive or defraud the public; or which disqualifies him to practice with

safety to the public, in violation of Section 1325 General Code of Ohio.

4. That the said Dr. Irwin Unger having a license to practice dentistry in the State of Ohio, was a party to an arrangement of a type prohibited by Section 1329 General Code of Ohio with the State Dental Laboratory.

(Record, pages 14 & 15.)

Error was prosecuted to the Court of Common Pleas of Cuyahoga County, Ohio, which court made the following finding and which finding was affirmed by the Court of Appeals, Eighth District of Ohio, and the Ohio State Supreme Court:

"Said Dr. Irwin Unger made use of advertising solicitors and/or publicity agents, to-wit: Henry Urden and/or Edward Urden, doing business as State Dental Laboratory, Edward Urden and/or Henry Urden and State Dental Laboratory, between the times of Jan. 15, 1941, and June 19, 1941." (Rec. p. 23.)

The petitioner is a duly licensed dentist. He opened an office in the Cleveland Arc de, a downtown office building in Cleveland, Ohio, on April 1, 1941 (R. pp. 111-115), as one of six or seven other dentists having offices in that building.

The State Dental Laboratory was an office where the general public could get broken plates repaired or duplicated. It was also located in the Arcade Building. No dentists were employed by the Laboratory, but this Laboratory did advertise to the general public that it repaired false dentures and duplicated false plates of teeth. This Laboratory was a lawful enterprise.

It had operated from October, 1939, to August, 1941. While it is the finding of the Ohio State Dental Board that the petitioner made use of this Laboratory as an advertising solicitor from January 15, 1941, to January 19, 1941, it must be noted that he did not open his office in the Arcade until April 1, 1941.

The petition on which the cause of action is based was sworn to by Ernest H. Sellers, who is an inspector for the Ohio State Dental Board. His testimony, however, does not confirm any of the allegations set forth in the petition (R. pp. 103-109) and the claim rests upon the testimony of three witnesses—one of whom was a paid informer and another received money from the agent of the respondent.

The informer was Elmer Clupper. (R. pp. 50-55.) On May 1, 1941, he was hired by Inspector Sellers and Dr. William Sterling, a member of the Ohio State Dental Board. At their instance he went to the State Dental Laboratory (R. p. 41) and over the objection of the petitioner he was permitted to testify to a communication he had with a man at the State Dental Laboratory. He could not identify this man but testified that he was given a card and instructed to go to appellant's office. He then visited appellant's office and an impression was taken of his mouth, for which he paid three dollars. That impression was then delivered to Dr. Sterling and Sellers and he was paid for his services. He further stated that he had no conversation with petitioner.

The next witness was Gertrude Quarles. (R. pp. 60-67.) She likewise was permitted over objections to testify to a conversation with a lady in the State Dental Laboratory, who is not identified. Her testimony was to the fact that this lady referred her to the petitioner's office—he made an impression of her mouth and she paid him three dollars. This was May 1, 1941.

As she was leaving the Arcade she was stopped and questioned by Dr. Sterling and Sellers. She stated that she had no complaint about the service that had been given her in the petitioner's office, but appeared in court solely because she was summoned. Her husband was called to verify these facts. (Rec. p. 67.)

The third witness was Frances Sanders, a resident of Lorain. (R. pp. 85-90.) On April 18, 1941, with her hus-

band she visited the State Dental Laboratory and likewise over objections was permitted to tell that some man sent her to Dr. Unger's office. She went to the office where, after an examination, Dr. Unger was unable to make a good impression because of the condition of her mouth. He charged her five dollars and notified her to return.

Like the witness Quarles, she was stopped by Sellers and Dr. Sterling when leaving the Arcade and they secured her name and address. The next day Sellers called at her home in Lorain and told her not to come back to Dr. Unger's office and paid her ten dollars.

These three incidents—one on April 18, 1941, and two on May 1, 1941, are the basis of the court's finding that the petitioner made use of the State Dental Laboratory as an advertising solicitor and publicity agent between January 15, 1941, and June 19, 1941.

No person from the State Dental Laboratory was called as a witness. Each of the witnesses was permitted to testify to conversations that they had with unidentified persons who were in the office of the State Laboratory, which conversations were out of the hearing and presence of Dr. Unger. No conspiracy was alleged in the petition, neither is there the slightest evidence of the existence of a conspiracy between the State Dental Laboratory and the petitioner. Objections of the petitioner to this type of testimony were overruled as appears on pages 42, 43, 44, 45, 46, 48, 49, 55, 58, 61, 62, 63, 64, 65, 68, 69, 70, 71, 79, 80, 82, 86, 87, 88, 89, 102, 104, 106, 107, 122 of the record.

When the case was heard on appeal by the Court of Common Pleas, it was stipulated (R. p. 25) that the record of the proceedings before the Board would be evidence before the Court, and that the Court should rule on the objectionable evidence in the manner as set forth in this statement which appears on page 26 of the record.

> "The Court: I will use a pencil to indicate the remarks on the margin of the page where objections are

found, and sign my initials 'H.W.E.,' with a circle around my name."

The record shows that the Court did not rule on all objections. In the several instances where he did rule, except one which appears on page 71, he followed the rulings of the State Dental Board. No rulings were made by the Court to the objections which appear on pages 45, 49, 61, 63, 65, 79, 80, 82, 85, 86, 87, 88, 89, 101, 102, 104, 107 and 122.

It is fundamental that conversations and acts are permissible when they are a part of the *res gestae* or when a conspiracy has been alleged and proven, or when they are in the presence or hearing of the adverse party. Otherwise they are not.

Without the admission of this hearsay evidence, there is absolutely nothing to connect the petitioner with the State Dental Laboratory.

As reason for granting the writ we submit the following authorities:

> "The admission over objection of hearsay evidence is a ground for reversal if such evidence is of a nature to be damaging to the adverse party." (17 *Ohio Jurisprudence*, p. 278.)
>
> "Probably the most important objection to admitting hearsay testimony in evidence is that the declarant is not present and available for cross examination. The exercise of the right to cross examine the witness of the adverse party is regarded as, and is in fact, essential in the administration of justice to discover the falsity of testimony and prevent the admission of perjured testimony." (*American Jurisprudence*, Vol. 20, page 201, paragraph 452.)

Wigmore's Code of the Rules of Evidence, Second Edition, page 259:

> "Hearsay Rule in General.
>
> "Rule 147. General Principle. Every human assertion, offered testimonially (Rule 28, Art. 1, ante

No. 201), i.e. as evidence of the truth of the fact asserted, must be subjected to two tests (W. No. 1362):

(1) The person making the assertion must be subjected to cross examination by the opponent, i.e. must make it under such circumstances that the opponent has an adequate opportunity, if desired to test the truth of the assertion by questions which the person is compellable to answer;

(2) The person making the assertion must be confronted with the opponent and the tribunal, i.e. must be in their presence when making the assertion and giving his answers."

Thomas A. Delaney, Petitioner, v. United States of America, 263 U. S. 586, 68 Law Ed. 462, syllabus (3):

"3. The admission of hearsay evidence against objection is reversible error, as depriving accused of the constitutional right to be confronted with the witnesses against him."

68 Law Ed. page 465:

"It is contended that hearsay evidence was received against petitioner, and this is erected into a charge of the deprivation of his constitutional rights to be confronted with the witnesses against him. Hearsay evidence can have that effect, and its admission against objection constitute error. *Diaz v. United States*, 223 U. S. 442, 450, 56 L. Ed. 500, 503, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138; *Rowland v. Boyle*, 244 U. S. 106, 108, 61 L. ed. 1022, 1023, P. U. R. 1917C, 685, 37 Sup. Ct. Rep. 577; *Spiller v. Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 130, 64 L. ed. 810, 819, 40 Sup. Ct. Rep. 466."

James Donnelly, Plaintiff in Error, v. United States, 228 U. S. pages 242, 243; 57 Law Ed. 820, 821, syllabus (12):

"12. The extrajudicial confession of a third person, since deceased, that he had committed the murder with which the accused is charged, is not admissible in evidence in behalf of the accused."

The following from the opinion, page 275, 58 Law Ed. 834:

"We do not consider it necessary to further review the authorities, for we deem it settled by repeated decisions of this court, commencing at an early period, that declarations of this character are to be excluded as hearsay.

Queen v. Hepburn (1813), 7 Cranch, 290, 295 L. ed. 348, 349, was a suit in which the petitioners claimed freedom, and certain depositions were rejected by the trial court as hearsay. This Court, speaking through Chief Justice Marshall, said:

'These several opinions of the court (meaning the trial court) depend on one general principle, the decision of which determines them all. It is this: that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. * * * It was very justly observed by a great judge that all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.' One of these rules is that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible. * * * The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all. If the circumstance that the eyewitnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, a claim

to which might be supported by proof so easily obtained. * * * This court is not inclined to extend the exceptions further than they have already been carried.

This decision was adhered to in *Davis v. Wood* (1816) 1 Wheat. 6, 8, 4 L. ed. 22, 23; *Scott v. Ratliffe* (1831) 5 Pet. 81, 86, 8 L. ed. 54, 55; *Ellicott v. Pearl* (1836) 10 Pet. 412, 436, 437, 9 L. ed. 475, 485, 486; *Wilson v. Simpson* (1850) 9 How. 109, 121, 13 L. ed. 66, 71; *Hopt v. Utah* (1884) 110 U. S. 574, 581, 28 L. ed. 262, 265, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417. And see *United States v. Mulholland,* 50 Fed. 413, 419."

The petitioner claims that the Ohio State Dental Board was not a fair and impartial board. Dr. William Sterling sat as a member of the Board and participated during part of the hearing as judge of petitioner's conduct. When it was developed, and not until then, that he had hired and paid the witness (R. p. 52), Elmer Clupper, he decided he would not continue to participate in the case (R. pp. 54-55), although he knew that when he started into the case and during the testimony of Elmer Clupper that the witness had been hired and paid by him.

Under the circumstances there can be no question but that his activities met with the approval of the Board and his presence during the trial and his membership on the Board could not help but have a prejudicial effect to the cause of the petitioner. This is the kind of a trial which was condemned by the United States Supreme Court in the case of *Tumey v. State, etc.,* 273 U. S. 510, syllabus (2):

"An accused is unconstitutionally deprived of due process of law if his liberty and property are subjected to the judgment of a court the judge of which has a direct and substantial pecuniary interest in reaching a conclusion against him."

WHEREFORE, it is prayed for the reasons stated and on the authorities of the cases cited that this Petition be granted.

WILLIAM J. CORRIGAN,
620 Williamson Bldg,
Cleveland, Ohio,
Attorney for Petitioner.

APPENDIX.

UNGER v. DENTAL BOARD.

142 O. S. 67

Statement of the Case.

UNGER, APPELLANT, *v.* OHIO STATE DENTAL BOARD, APPELLEE.

State Dental Board—License of dentist revoked for using advertising solicitor or publicity agent—Section 1325, General Code—Supreme Court—Sufficient competent evidence supported judgments of courts below.

(No. 29259—Decided July 7, 1943.)

APPEAL from the Court of Appeals of Cuyahoga county.

Section 1325, General Code, provides in part:

> "The State Dental Board may warn, reprimand, or otherwise discipline a licensee for any violation of its rules or of any laws pertaining to the practice of dentistry or dental hygiene and in addition thereto may revoke or suspend a license obtained by fraud or misrepresentation, or if the person accused is convicted subsequent to the date of his license of a felony involving moral turpitude, or is convicted for the violation of any provisions of the law regulating the practice of dentistry or dental hygiene, * * * or employs or makes use of advertising solicitors or publicity agents; * * *."

In June of 1941, one Sellers, inspector for the Ohio State Dental Board, filed charges with the board against Dr. Irwin Unger, a licensed dentist of the city of Cleveland, and the appellant herein, alleging that in connection with the practice of his profession between the dates of January 15, 1941, and June 19, 1941, Dr. Unger had been guilty of acts violating the dental code of Ohio, by reason of which his license should be revoked or suspended.

The specifications of improper conduct covered the alleged relationship between Dr. Unger and the State Dental Laboratory, engaged in the fabrication and repair of dental plates. Both occupied nearby offices on the third

floor of the Arcade Building in the city of Cleveland. Included were statements which if true would establish that Dr. Unger had made use of the State Dental Laboratory as an advertising solicitor or publicity agent.

During the period of time in issue, dental laboratories could deal directly with the public, the amendment to Section 1329, General Code, not then being effective.

The secretary of the dental board sent Dr. Unger a copy of the charges and notified him that a hearing would be held thereon before the board in Cleveland on July 29, 1941. The doctor filed an answer. After admitting his status as a dentist, duly licensed to practice in Ohio, he denied the charges generally.

A hearing was had as scheduled, at which evidence was introduced in the form of testimony of several witnesses that an established arrangement existed between Dr. Unger and the State Dental Laboratory, an advertiser in the newspapers, whereby the latter would direct its customers to Dr. Unger who would make impressions of their gums and jaws, charge them a fee of from three to five dollars and either have the impressions sent to the laboratory or deliver them to his erstwhile patients who would take them there.

Dr. Unger did not testify in his own behalf and declined to submit to cross examination.

Offered in evidence as an exhibit was a certified copy of a decision of the State Dental Board, rendered September 24, 1940, wherein Dr. Unger was suspended from the practice of dentistry for three months, pursuant to his plea of guilty to charges of prohibited conduct in connection with the Euclid Dental Laboratory. This exhibit was received solely for consideration in relation to the punishment to be imposed in the event of a finding of guilt.

The board found Dr. Unger guilty of certain of the specifications in the statement of charges and entered an order, effective August 11, 1941, revoking his license to

practice dentistry. An appeal was perfected to the Court of Common Pleas of Cuyahoga county under Sections 1327 and 12223-23, General Code. By agreement, the case was submitted upon the transcript of the evidence taken before the dental board and upon arguments of counsel.

A part of the judgment entry of the Court of Common Pleas is as follows:

> "Upon due consideration of the evidence * * *, the court finds that appellant has made use of an advertising solicitor and publicity agent, to wit, the State Dental Laboratory, as alleged in specification A-3 of the statement of charges filed with said Board against said appellant, in violation of Section 1325, General Code.
>
> "The court further finds that the evidence does not sustain any other charge or specification of the charges herein.
>
> "The court further finds that said violation by appellant warrants the revocation of the license of Irwin Unger, appellant, to practice dentistry in the state of Ohio, under authority of said Section 1325, General Code.
>
> "It is therefore ordered, adjudged and decreed that the license of Irwin Unger, appellant, to practice dentistry in the state of Ohio be and the same is hereby revoked."

A further appeal was taken to the Court of Appeals where the judgment of the trial court was affirmed. The motion to require the Court of Appeals to certify its record having been allowed by this Court, the cause is here for decision on its merits.

Mr. William J. Corrigan and *Mr. Henry A. Beckerman* for appellant.

Mr. Thomas J. Herbert, attorney general, and *Mr. Daronne R. Tate,* for appellee.

By the Court. While this court does not weigh evidence, it will examine the record to ascertain whether there is competent evidence to support the judgment of the court below. 2 *Ohio Jurisprudence*, 739, Section 658.

That has been done in the present case and a majority of the court is of the opinion that sufficient competent evidence was introduced against the accused to support the judgment of the lower court.

Wherefore, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

Weygandt, *C. J.*, Matthias, Zimmerman and Turner, *JJ.*, concur.

Hart and Bell, *JJ.*, dissent.

Williams, *J.*, not participating.

Bell, *J.*, dissenting. The General Assembly, under the police power, has passed an elaborate code regulating the practice of dentistry in this state. Sections 1314 to 1333-1, both inclusive, General Code.

To provide for enforcement of the act, an administrative board called the State Dental Board was created. By the act, the board is granted wide powers, among which is the power to conduct hearings and revoke the license of any practicing dentist.

We are concerned here with the power to revoke the license of appellant.

In my consideration of the case, the first inquiry is what is the nature of the proceeding where charges are preferred against a practicing dentist. Is it a civil action, *quasi*-criminal, or a criminal prosecution?

The second inquiry is what *quantum* of proof is necessary to convict—a preponderance of the evidence, clear and convincing evidence, or evidence which convinces beyond a reasonable doubt.

So far as I have been able to ascertain this court has never determined either the nature of the proceeding or the *quantum* of proof necessary to warrant a judgment of guilty.

The proceeding has many of the attributes of a criminal prosecution and substantially none of a civil action.

In my judgment, where charges are preferred under Section 1325, General Code, the proceeding is *quasi*-criminal in nature and, to sustain a conviction, clear and convincing evidence is required.

Section 1325, General Code, enumerates certain acts for which a license may be revoked, and the charges were filed alleging a violation of one of the provisions of this section.

The appellant was charged in the specifications with the violation of the statute in eight separate and distinct particulars.

He was found guilty of charge A-3 only by the Court of Common Pleas of Cuyahoga County.

The purport of charge A-3 is the violation of the following clause of Section 1325, General Code:

"* * * or employs or makes use of advertising solicitors or publicity agents."

Charge A-3 reads as follows:

"3. Said Dr. Irwin Unger has made use of advertising solicitors and/or publicity agents, to wit: Henry Urden and/or Edward Urden, doing business as the State Dental Laboratory, Edward Urden and/or Henry Urden and State Dental Laboratory, between the dates of January 15, 1941, and June 19, 1941."

The appellant filed an answer admitting that he was a dentist duly licensed to practice dentistry, denied that he had been guilty of any acts or practices violating the dental code of Ohio and specifically denied the charges contained in the specifications.

Earnest H. Sellers, an inspector employed by the State Dental Board, preferred the charges against appellant.

On July 29, 1941, the matter came on for hearing at Cleveland, Ohio. All of the board members were present, including Dr. Wm. J. Sterling, to whom attention presently will be directed. The board, the complainant and the appellant were all represented by counsel.

For the sake of brevity the State Dental Laboratory will be designated as the laboratory and Dr. Unger as appellant.

A brief consideration of the evidence is instructive.

Elmer Clupper testified that Dr. Sterling and Earnest H. Sellers met him in another dentist's office in the Old Arcade Building in Cleveland, on May 1, 1941, and hired him to go to the laboratory and represent that he desired to purchase a denture. The witness went there and talked with some person in the office. He was permitted to relate what the clerk said to him and what he said to the clerk. After that conversation he was sent to appellant's office and appellant took an impression for a denture for which Clupper paid a small fee. He was given the impression which he took back and delivered to Sellers and was paid three dollars for his services by Dr. Sterling.

Gertrude Quarles, accompanied by her husband, Samuel Quarles, on May 1, 1941, went to the office of the laboratory and met a clerk with whom she had a conversation about a new denture and she also was sent to the office of appellant who took an impression for her denture for which she paid three dollars. She was given the impression and returned it to the laboratory. As she and her husband left the building they were accosted by Dr. Sterling and Sellers. Sellers showed a badge, asked the Quarleses where they had been and discussed with them what had been said at the laboratory and at appellant's office.

Frances Sanders was called and testified that on April 18, 1941, she went to the laboratory to purchase a denture.

She testified as to her conversation with the employee of the laboratory; that she was sent to appellant's office where an impression was taken of both the upper and lower jaws, for which she paid appellant five dollars; and that she paid the laboratory five dollars on account of the purchase price of the denture. On the same day, complainant visited this witness at her home in Lorain, Ohio, and gave her the ten dollars and at least intimated that she should not return to the laboratory; and she never did return. All of the conversations at the laboratory were held in the absence of the appellant.

H. B. Pugsley, office manager of the Cleveland Press, and Kenneth J. Sharp, credit manager of the Cleveland News, newspapers published in Cleveland, Ohio, were called.

The testimony of Pugsley discloses that the laboratory had advertising contracts from October 1939, to the time of the hearing, and that the appellant had nothing whatsoever to do with those contracts.

The testimony of Sharp disclosed that the laboratory had an advertising contract with the Cleveland News for one year from November 1, 1940, but failed to disclose that appellant had anything to do with that contract.

There was also offered and received in evidence a certified copy of a judgment of the dental board wherein appellant was suspended from practice for three months in the year 1940 for making impressions in connection with another laboratory.

This, in substance, is the evidence offered in support of the charges.

The appellant offered one witness, H. S. Malm, the assistant manager of the Old Arcade building, who testified that appellant leased his own space and paid his own rent as well as the expense of remodeling the rented space.

Appellant did not testify in his own defense.

The dental board found appellant guilty and inflicted the most severe penalty provided by law, revocation of his license.

The appellant appealed to the Court of Common Pleas and the cause was submitted by agreement upon the transcript of the evidence taken before the board. That court found appellant guilty of specification A-3 heretofore quoted and inflicted the same penalty as the board.

The Court of Common Pleas, in effect, treated the appeal as a proceeding in error, followed the rulings of the board upon questions of evidence as well as upon the question of penalty.

By the language of Section 1327, General Code, the appeal provided for is a trial *de novo* wherein the court should exercise its independent judgment both as to the admissibility of evidence and penalty in the event of conviction.

It is clear that the court exercised no independent judgment in this case.

An appeal on questions of law was perfected in the Court of Appeals and the judgment of the Court of Common Pleas was affirmed.

We are without benefit of the reasoning of the two aforementioned courts as neither court wrote any opinion.

This case should be reversed for three reasons.

First. Appellant did not have such a fair and impartial hearing as is contemplated by law.

Dr. Sterling and Sellers were actively engaged in securing the evidence and were financially interested in the outcome of the case, they having paid money to witnesses (Elmer Clupper and Frances Sanders) who testified in behalf of complainant. Dr. Sterling then proceeded to sit in the case as one of the judges until Elmer Clupper, during his testimony, pointed out Dr. Sterling as the man who had paid him money. After Dr. Sterling had been pointed

out by the witness this colloquy took place between Dr. Harris, president of the board, and counsel for appellant.

"(Thereupon the officers and members of the board conferred.)

"President Harris: At this time, Mr. Corrigan, I am authorized by Dr. Sterling to state, if you desire, he will withdraw from any consideration of this case, by reason of the testimony of this witness.

"Mr. Corrigan: I ask that all the testimony of this witness be stricken, because it is testimony or evidence obtained in a plot to entrap Dr. Unger. * * *

"Mr. Corrigan: I don't think it is up to me as counsel here, to say anything about who should sit on this case. I don't think I have any authority on it.

"Mr. Rees: You may step down, Mr. Clupper.

"(Witness excused.)

"Mr. Corrigan: I presume, when I come in, we are tried before an impartial board.

"President Harris: Let the record show at this time Dr. Sterling is withdrawing from the consideration of this case.

"(Thereupon Dr. Sterling withdrew.)

"Mr. Corrigan: Does the record show the members of the Board that are present?

"President Harris: Yes, the board consists of five members, and they are all here."

Dr. Sterling knew the part he had played before the hearing started and certainly he should not have waited until pointed out by the witness to offer to retire.

That Dr. Sterling did not retire is shown by the record. Later he was again pointed out in the hearing room by Samuel Quarles during his testimony.

The last evidence introduced by complainant at the hearing was a certified copy of a judgment entered in 1940 by the State Dental Board suspending appellant's license to practice for three months under facts similar to those here involved. Objection was made by counsel for appel-

lant. The board admitted this document upon the unusual theory that the board would use the instrument only in fixing punishment in the event appellant was found guilty.

In admitting this evidence President Harris made this statement:

> "Mr. Rees: At this time I would like to offer in evidence complainant's Exhibit 17, which is a certified copy of the decision of the Ohio State Dental Board in the matter of the charges against Dr. Irwin Unger and the decision of the board rendered on December 24, 1940.
>
> "Mr. Corrigan: I object to it.
>
> "President Harris: Well, of course, the board will take notice of its own orders and this certified copy may be admitted solely for the purpose of consideration of punishment in the event that the board does find Dr. Unger guilty of any of the alleged charges. It will not be considered on the merits of the case, of course."

This board was sitting as both court and jury. To admit any document in evidence to be used in imposing sentence before determination of guilt was prejudicial to appellant.

To my mind it is a fair inference that this document could serve no purpose other than to prejudice the appellant before the board and the Court of Common Pleas in the event of an appeal.

This was the kind of trial which was condemned by the United States Supreme Court in the case of *Tumey v. State*, 273 U. S., 510, 71 L. Ed., 749, 47 S. Ct., 437.

Second. Error in the admission of evidence.

The case was tried upon the theory of conspiracy.

Whether there was a conspiracy is important in determining whether competent evidence only was received and considered, both by the board and the Court of Common Pleas.

Under Section 1329, General Code, then in force, a dental laboratory could not take impressions of teeth or jaws, therefore it was necessary in the conduct of its business, when a customer desired a denture, to first send such customer to a licensed dentist to secure an impression. Any dentist had the lawful right to take the necessary impressions and charge a fee.

At the time here in question, *viz.*, April 1, to June 19, 1941, a dentist had the legal right also to advertise within the limitations contained in Section 1329, General Code.

The record discloses all the conversations between the witnesses Clupper, Quarles and Sanders and employees of the laboratory were admitted over the appellant's objection upon the theory of conspiracy, upon the statement that the evidence would be connected with appellant. No testimony in any manner connecting these conversations with appellant was offered. However, it all was permitted to remain in the record.

The Court of Common Pleas considered all of this evidence in arriving at its conclusion.

When construed most strongly against appellant the evidence discloses that three persons were sent by the laboratory to appellant's office for impressions which appellant made and for which a fee was charged.

There was not a syllable of direct testimony tending to prove the charge that there existed some arrangement between some person by the name of Urden or the laboratory and appellant. There was no evidence of fee splitting and there was direct proof that appellant had nothing to do with the laboratory's advertisement.

The State Dental Board apparently proceeded upon the theory that it was a violation of Section 1325, General Code, for a licensed dentist to take impressions of the teeth and jaws of persons sent him by a dental laboratory. This conclusion is supported by the fact that Mr. Sellers testified that on or about April 18, 1941, he went to appellant's

office, told appellant he heard that appellant was making impressions for the laboratory and proceeded to question appellant in respect thereto.

I maintain that under the law then in force, appellant had the legal right to make impressions for any or all persons sent by the laboratory and in so doing he was not violating the provisions of Section 1325, General Code.

To convict the appellant a conclusive inference of guilt must be drawn from circumstantial evidence.

The accused should not be found guilty upon circumstantial evidence unless the facts and circumstances proven are wholly consistent with guilt and completely inconsistent with innocence.

The only fair inference from this evidence in my judgment is that appellant did nothing which he did not have a legal right to do.

Third. The case was tried upon the theory of conspiracy.

It was claimed that a conspiracy existed between appellant and Urden and the laboratory. The evidence offered was admitted upon that basis. If any doubt exists as to that being the theory of the prosecution it is forever set at rest by the statement of complainant's counsel as well as the briefs and arguments in this court.

It should be pointed out that at all times from January 15, 1941, to June 19, 1941, the laboratory had the legal right to transact business directly with the public and to advertise its business in the manner disclosed by this record. Amended Section 1329, General Code, did not become effective until August 21, 1941. No one reading this record can find any evidence of conspiracy.

A conspiracy is a combination of two or more persons by some concert of action to do an unlawful act or a lawful act by criminal or unlawful means.

The acts of the laboratory being lawful it could not be a party to the conspiracy claimed. Appellant could not

enter into a conspiracy with himself and the claim of conspiracy vanishes into thin air.

A great deal is made of the fact that appellant did not take the witness stand.

Appellant's failure to testify cannot justify a conviction where, as here, there is an entire failure of proof of any violation of law.

HART, *J.*, concurs in the foregoing dissenting opinion.

(4)

No. 520

Supreme Court of the United States

OCTOBER TERM, 1943.

IRWIN UNGER,

Petitioner,

vs.

THE OHIO STATE DENTAL BOARD,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS J. HERBERT,
Attorney General of Ohio,
Attorney for Respondent.

RODENFELS LAW PRINTING COMPANY, Columbus 15, Ohio.

INDEX.

Cases Cited.

Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

IRWIN UNGER,

Petitioner,

vs.

THE OHIO STATE DENTAL BOARD,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

The Ohio State Dental Board was heretofore created by legislation enacted by the General Assembly of the state of Ohio and vested with power to regulate and supervise the practice of dentistry in this state. In the exercise of this authority it heretofore revoked the right

of petitioner to engage in the practice of dentistry following the hearing of certain charges theretofore filed against him. The charges pertained to his use of a dental laboratory as advertising solicitors or publicity agents.

The statutory enactment under which respondent proceeded was Section 1325, General Code of Ohio, which is set forth in full at page 9 of the petition for writ of certiorari.

The action of the Ohio State Dental Board in revoking petitioner's license was sustained by the Court of Common Pleas when it came on for a **de novo** trial in that court. Thereafter an appeal was perfected to the Court of Appeals which affirmed the judgment of the lower court. Thereupon petitioner filed an application in the Supreme Court of Ohio to certify the case for hearing which was granted. The case was thereafter heard in that court on its merits. This court affirmed the action of the Court of Appeals, two of the seven judges thereof dissenting and one judge not participating.

Petitioner now seeks to have this court review the action of the Supreme Court of Ohio.

JURISDICTION OF THIS COURT.

Petitioner seeks to invoke the jurisdiction of this court by virtue of Title XXVIII, U. S. C., Section 344 (b). No treaty or statute of the United States is involved and therefore the sole question that seemingly can be raised is whether or not there is drawn in question the validity of a state statute (Section 1325, supra) that is repugnant to the Constitution of the United States.

NO FEDERAL QUESTION PRESENTED BY RECORD.

One of petitioner's arguments is that the Ohio State Dental Board deprived him of his right to practice dentistry without due process of law. This is the only conceivable federal question that can be involved.

Reference to page 124 of the transcript of the record will disclose that petitioner urged seven assignments of error in the Court of Appeals. Since the Supreme Court of this state will not weigh the evidence, one of the assignments of error was omitted in that court. With that exception the same assignments of error were claimed therein as had been urged in said Court of Appeals.

In none of these assignments of error was it claimed that Section 1325, supra, is unconstitutional. Nor is it urged that there was an unconstitutional exercise of authority thereunder. We therefore submit that petitioner now seeks to present a federal question which was not raised below, nor passed upon by any court. Precisely how he is able to now raise that question is not explained.

CONTENTIONS OF PETITIONER.

Short work can be made of the contentions which are raised by petitioner.

Petitioner grounds his right to have this court review the decision of the Supreme Court of Ohio because of the principles announced in the case of Tumey v. State, 273 U. S., 510. He endeavors to draw an analogy between the facts in that case and the proceedings that occurred before the Ohio State Dental Board. In the **Tumey** case it was held in substance that an accused is unconstitutionally deprived of due process if the court which hears the matter has a substantial pecuniary interest in reaching a conclusion against him. In the instant case it is urged that because one of the members of the Ohio State Dental Board paid money to a witness who appeared before the board, the said board was apparently without authority to pass upon the charges. The record discloses that the witness in question went to some trouble in obtaining the evidence which he presented before the board and it was for his time and trouble that he was compensated. The member of the board in question derived no financial gain from the transaction. In fact he sustained a pecuniary loss rather than a gain. Precisely, therefore, how the Tumey case bears any analogy to the matter here being considered is not plain.

Among other reasons petitioner urges that this court should grant the petition for writ of certiorari for the reason that the case below was tried on the theory of a conspiracy and that hearsay evidence was admitted over

petitioner's objection. Neither of these matters involve a federal question. We are at a loss, therefore, to understand how such reasons can be assigned as the basis for this court entertaining jurisdiction.

LAW AND ARGUMENT.

This court has held in Zucht v. King, 260 U. S., 174, that it will decline jurisdiction, although the constitutionality of a state law is drawn in question, when it appears that the constitutional question presented is not substantial in character. In that case the court pointed out the validity of the ordinances under consideration was drawn in question by objections properly taken below. Such is not the situation here with respect to the statutes of Ohio. But even assuming that petitioner had taken the proper action to preserve the federal question, the **Zucht** case has particular application to the matter here under consideration.

Attention might also be called to Semler v. Oregon State Board of Dental Examiners, 294 U. S., 608, wherein it was held that a state may regulate the practice of dentistry and that the obligation of contracts is not unconstitutionally impaired where interference with their performance is a result of a proper exercise of the police power. See also Toole v. Michigan State Board of Dentistry, 316 U. S., 647, wherein a motion to dismiss was granted for want of a substantial federal question on the authority of the **Semler** case.

An examination of the several decisions of this court that are cited by petitioner discloses that none of them

has particular application to the matter here to be determined. They deal essentially with the admission of hearsay evidence in criminal cases. Petitioner apparently forgets the fact that this was a hearing before an administrative board and that the rule with respect to the admissibility of evidence is not drawn with the same degree of fineness as it is in hearings before courts. See Meffert v. Packer, affirmed by this court without opinion November 14, 1904, 195 U. S., 350.

CONCLUSION.

It is respectfully submitted that petitioner has not demonstrated why this court should entertain jurisdiction. Consequently the petition should be denied.

Respectfully submitted,

THOMAS J. HERBERT,
Attorney General of Ohio,
Attorney for Respondent.